place the property," notified the insured of its election to rebuild, but subsequently expressly refused to rebuild. In fact nothing was done towards rebuilding. The insured brought suit for the money value of the policy. *Held;* The insured can recover; it is optional with him to sue for the money indemnity, or for damages upon the agreement to rebuild. *Gage* v. *Connecticut Fire Insurance Co.* (Okla. 1912) 127 Pac. 407.

The strong trend of authority has been to consider policies containing an option to rebuild, as contracts with a double aspect, viz: to indemnify by a money payment; or to indemnify by rebuilding. Which it shall be is at the election of the insurer, but an election once made cannot be retracted. Neither feature of the contract is primary but they are in the alternative. An election to pay the face value of the policy creates the relation of debtor and creditor, but an election to rebuild makes the policy an ordinary building contract, with the rights, duties, obligations and measure of damages which pertain to building contracts. In such an election the liability for the face value of the policy never arises. At least such is the result where the insurer has commenced the work of rebuilding. *Morrell* v. *Irving Fire Ins. Co.,* 32 N. Y. 429, 88 Am. Dec. 396; *Beals* v. *Home Ins. Co.* 36 N. Y. 522; *Heilman* v. *Westchester Fire Ins. Co.,* 75 N. Y. 7; *Wynkoop* v. *Niagara Fire Ins. Co.,* 91 N. Y. 478, 43 Am. Rep. 686; *Munk* v. *Maryland Casualty Co.,* 116 App. Div. (N. Y.) 756; *Winston* v. *Arlington Fire Ins. Co.,* 32 App. D. C. 61, 20 L. R. A. N. S. 960; *Zalesky* v. *Iowa State Ins. Co.,* 102 Iowa 512, 70 N. W. 187; *American Cent. Ins. Co.* v. *McLanathan,* 11 Kan. 533; *Henderson* v. *Crescent Ins. Co.,* 48 La. Ann. 1176, 35 L. R. A. 385; *Fire Ass'n.* v. *Rosenthal,* 108 Pa. 474; *Hartford Fire Ins. Co.* v. *Peebles' Hotel Co.,* 82 Fed. 546, 27 C. C. A. 223; *Brown* v. *Royal Ins. Co.,* 1 El. & El. 853. See 3 AM. LAW REG. (N. S.) 404 at 414; COOLEY, BRIEFS 3832. VANCE, INS., § 179: 2 MAY, § 423. The principal case distinguishes between cases where the insurer begins the work of rebuilding, and those where an election is made and no work is done, by holding that in the latter the insured can elect his remedy. Such a distinction was denied *arguendo* in *Hartford Fire Ins. Co.* v. *Peebles' Hotel Co., supra,* but is supported by *Langan* v. *Aetna Ins. Co.,* 99 Fed. 374, affirmed 48 C. C. A. 174, 108 Fed. 985; *Home Mut. Fire Ins. Co.* v. *Garfield,* 60 Ill. 124, 14 Am. Rep. 27; 4 JOYCE, INS., § 3163. This conflict arises from the fact that the latter courts view the provision to rebuild not as an alternative right under the original contract but as an accord which is not valid as a satisfaction until executed. This difference in view-point is fundamental and cannot be reconciled with the majority cases.

INSURANCE—EXCEPTED OCCUPATIONS—PROXIMATE CAUSE.—A benefit certificate exempted the insurer from liability for death "directly traceable to employment" in the "occupation" of brakeman. Insured was run over in the yards of the railroad by which he was so employed, ten minutes before he would have been on duty had he been "called." Whether he had been "called," and what he was doing between the cars, were facts unexplained by the evidence. *Held,* if a brakeman is run over when not on duty or performing any office of his employment, his death is not directly traceable to

his employment. *Wolfgram* v. *Modern Woodmen of America* (Mo. App. 1912), 149 S. W. 1167.

The construction of equivocal language in favor of the insured, and the strict application of the doctrine of proximate cause where excepted risks are involved, is the justification for this case. To escape liability, the insurer must first expressly limit and define the excepted risk. *Union Cent'l Life Co.* v. *Hughes,* 110 Ky. 26, 60 S. W. 850; *Hobbs* v. *Iowa Mut. Ben. Asso.,* 82 Iowa 107, 11 L. R. A. 299, 31 Am. St. Rep. 466; *Welts* v. *Conn. Mut. Life Ins. Co.,* 48 N. Y. 34; *Pohalski* v. *Mut. Life Ins. Co.,* 36 N. Y. Super. Ct. 234. The case of *Diseker* v. *Equitable Life,* 87 S. C. 187, 69 S. E. 153, which holds that firing a switch engine is within the exception, "of switching and coupling cars" appears to stand alone in tending toward a contrary doctrine. Mere casual employment in the forbidden occupation will not exempt the insurer, *Tucker* v. *Mut. Ben. Life. Ins. Co.,* 50 Hun. 50, affirmed in 121 N. Y. 718. Neither will such employment if it is only incidental to the insured's ordinary occupation, *Mortenson* v .*Cent'l Life Assur. Asso.,* 124 Iowa 277; *Holliday* v. *Am. Mut. Accident Asso.,* 103 Iowa 178. After the company has established as a fact that the insured met his death while engaged in a forbidden occupation, it must further prove that such occupation was the proximate cause of the death. *Summers* v. *U. S. Ins. Co.,* 13 La. Ann. 504; *Queatham* v. *M. W. A.,* 148 Mo. App. 33; *Freeman* v. *Merchantile Accident Asso.,* 156 Mass. 351, 17 L. R. A. 753, and cases *supra.*

INSURANCE.—EXPRESS WAIVER OF PROOFS OF LOSS.—The insured, through no fault of the insurer neglected to furnish formal proofs of loss within the specified period. After such time had elapsed, the insurer's agent, with due authority, said to the insured; "Certainly we are not technical. We will waive the formal proofs of loss." *Held*: This statement constituted a valid waiver. *Hatcher* v. *Sovereign Fire Assurance Co.,* (Wash. 1912), 127 Pac. 588.

Courts, uniformly adverse to forfeitures, especially for conditions that are to be performed subsequent to the loss, are disposed to construe slight circumstances as a waiver of an estoppel in favor of the insured. The principal case presents in its boldest form the theory that an express waiver of non-performance of such conditions need not be supported by either a consideration or any element of estoppel. This is in accord with the majority of cases. Some courts held that there can be an *implied* waiver of the breach of such conditions after the time for submitting proofs has passed, without any consideration or element of estoppel. These courts require only an intention to waive. *Rokes* v. *Amazon Ins. Co.,* 51 Md. 512, 34 Am. Rep. 323; *Hibernian Ins. Co.* v. *O'Connor,* 29 Mich. 241; *Fink* v. *Lancashire Ins. Co.,* 66 Mo. App. 513; *Ramsey* v. *Gen'l. Accident, Fire & Life Ins. Co.,* 160 Mo. App. 236, 142 S. W. 763; *Prentice* v. *Knickerbocker Life Ins. Co.,* 77 N. Y. 483; *Dobson* v. *Hartford Fire Ins. Co.,* 86 App. Div. (N. Y.) 115. affirmed 179 N. Y. 557; *Johnson* v. *Dakota Fire & Marine Ins. Co.,* 1 N. D. 167, 45 N. W. 799; *United Fireman's Ins. Co.* v. *Kukral et al.,* 7 O. Cir. Ct. 356, 4 O. C. Dec. 633, affirmed 51 O. St. 609; 9 COL. L. REV. 251. See generally, *Germania*